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No. 94-1322

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DANIEL COLON, JR.,

Petitioner,

—v.—

APEX MARINE CORP. c/o WESTCHESTER SHIPPING CO., INC. and WESTCHESTER MARINE, INC., and WESTCHESTER MARINE SHIPPING CO., INC., and VERTIGO, INC., d/b/a TILLIES KING SHIPPING CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Did the Court of Appeals commit error when it affirmed the district court's decision that under a unique set of facts a seaman on shore leave was not, as a matter of law, in the course of his employment pursuant to the Jones Act when he was injured?

STATEMENT REQUIRED BY RULE 29.1

Apex Resources, Inc. is the corporate parent of respondent Apex Marine Corporation, who is the corporate parent of respondent Westchester Marine Shipping Co., Inc. Neither corporation has any other non-wholly owned subsidiaries.

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DAVID COLON , JR.

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INTRODUCTION

Respondents Apex Marine Corporation and Westchester Marine Shipping Co., Inc. respectfully pray that this Court deny the Petition for Writ of Certiorari. The question raised by petitioner is not presented by the decision below. That decision rests on the application of existing principles to a unique factual situation. The First Circuit's affirmance of the district court's decision made no novel legal principle and its

affirmance created no conflict or lack of uniformity among the circuits. There is nothing in the decision below which merits, much less requires, plenary review by this Court.

STATEMENT OF THE CASE

The facts as presented to the district court are not in dispute. On appeal to the First Circuit, petitioner cited to the district court's statement of facts without claim of any error. The undisputed facts are that S/T CHARLESTON was a United States flag vessel managed by respondent Apex Marine Corp. At the time of the incident the vessel was docked at the United States port Providence, Rhode Island. Petitioner was an engineer in the engine department while Mr. McCarthy and Mr. DeJesus were able bodied seamen in the deck department. (5a)[1]

During the afternoon or evening of December 23, 1987 petitioner left the vessel on authorized shore leave and went to a bar where he met other crew members, two of whom were Mr. McCarthy and Mr. DeJesus. (5a) After a period of time petitioner and the other crew members shared a taxicab to other bars. (6a) Between 9:30 and 10:00 p.m. petitioner, Mr. McCarthy and Mr. DeJesus were in a bar known as Tillies King Cocktail Lounge, where they were playing video games and drinking. (6a) At approximately 10:30 p.m. an altercation broke out between Mr. McCarthy and Mr. DeJesus. (6a) The bartender asked petitioner to help break up the fight. In response, petitioner assisted the bartender with each restraining one of the two men. When the combatants were released, Mr. DeJesus again attacked Mr. McCarthy who retreated behind petitioner. (6a) Before the situation calmed, petitioner had been stabbed by Mr. DeJesus, who had attempted to stab Mr. McCarthy. Whether or not Mr. DeJesus had exhibited violent behavior in the past and whether respondent knew of any

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[1] Cites to the appendix of the Petition for Writ of Certiorari are cited by a page number followed by the letter "a".

such violent behavior were disputed facts at the district court level which were resolved in petitioner's favor but were irrelevant to that part of the decision which granted respondents summary judgment. Petitioner had testified in the district court action by deposition. When questioned as to his reason for intervention in the fight, petitioner failed to testify as to any duty regarding the crew members' safety. On appeal to the First Circuit, petitioner argued for the first time that as an officer he had intervened pursuant to a duty regarding the safety of crew members on shore leave.

ARGUMENT

I. THERE IS NO PUBLIC POLICY ISSUE TO BE ADVANCED BY REVIEW OF THE DECISION BELOW

Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties" and where "there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal" *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

The question presented by petitioner is not supported by the facts. To review the decision of the Court of Appeals would require the Supreme Court to assume disputed facts which were not presented to the trial court, nor received by the First Circuit and which are contrary to the facts which were introduced into evidence. This case involves no issue of public policy, but involved the application of existing law to a unique set of undisputed facts. (3a) While petitioner's counsel avers in the petition that petitioner had a duty to intervene in the altercation because of safety responsibilities charged to him as an officer, petitioner did not, in the courts below, submit evidence that petitioner acted because of such an alleged

duty. On appeal petitioner did not allege that the district court erred by omitting a relevant issue of fact regarding petitioner's reason for intervening. To the contrary, in his brief to the First Circuit, petitioner cited to the district court's recitation of the facts. His argument to the First Circuit had no factual basis but was lost by the facts as they were presented to the district court. The district court found as a matter of law, based upon the undisputed facts presented to it, that petitioner was on shore leave and did not intervene in the altercation pursuant to an express or implied duty to act. Contrary to his position taken in the writ, petitioner has never presented evidence that he acted because he had a duty to insure the safety of the other crew members.[2] The courts below therefore did not decide the question which petitioner now seeks to have reviewed. There is no public policy regarding safety to be advanced by this Court reviewing the question presented by petitioner because the facts do not show petitioner acted for safety reasons. Therefore, even if this Court were to rule that petitioner had a duty to intervene, it would not call for reversal or remand because there is no fact in evidence before the court to find that petitioner's reason for intervention in the altercation was based explicitly or implicitly on a duty to act for the safety of a crew member. Further, contrary to petitioner's assertion, extension of the Jones Act to the factual situation involved in this matter would not serve to encourage

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[2] Petitioner's argument that he was in the course of his employment because he was responsible for the safety of the two seamen in the deck department while they were in a bar in Providence, Rhode Island is the third reason petitioner has advanced for his actions. In a supplemental brief filed in the district court after oral argument petitioner cited to *Nowery v. Smith*, 69 F.Supp. 755 (E.D. Pa. 1946), aff'd, 161 F.2d 732 (3rd Cir. 1947) (per curium) and *Daughenbaugh v. Bethlehem Steel Corp., Great Lakes S.S. Div.*, 891 F.2d 1199 (6th Cir. 1989) for the proposition he did not have to be in the course of his employment to recover under the Jones Act. In his motion for reconsideration filed in the district court, petitioner argued that he intervened because he was concerned that the vessel might sail short handed. On appeal petitioner cited no facts to provide a basis for his argument that he acted due to a safety duty imposed upon him while recreating ashore.

a seaman to voluntarily intervene in altercations as did petitioner. If the Jones Act were extended such that petitioner was held to be in the course of his employment in the bar, petitioner would not have been acting voluntarily but would have been required to step into the fray, thus placing himself in danger. No public policy is advanced by requiring a seaman to place himself in danger.

Petitioner's public policy arguments are baseless. He is merely dissatisfied with the result below as it effects him personally. This Court has stressed that it does not "sit for the benefit of the particular litigants." *Rice*, 349 U.S. at 74.

II. THE DECISION BELOW IS NOT IN DISPARITY WITH THIS COURT OR WITH THE SIXTH CIRCUIT COURT OF APPEALS

Petitioner incorrectly asserts that the decision below is in conflict with a prior opinion of the Sixth Circuit. In *Daughenbaugh v. Bethlehem Steel Corp., Great Lakes S.S. Div.*, 891 F.2d 1199 (6th Cir. 1989) the plaintiff's decedent was a seaman who was returning to his ship from shore leave when he disappeared. His body was found three weeks later floating in the water near the dock where he had been last seen. The Sixth Circuit upheld the decision of the district court that *Daughenbaugh* was acting in the course of his employment when he disappeared. Citing several lower court cases and its own precedents, the Sixth Circuit stated "numerous lower courts have held that when a seaman is traveling along a standard route to leave the ship and go ashore or to return to the ship from shore leave, the seaman is acting within the course of his employment under the Jones Act." *Daughenbaugh* at 1206 (citations omitted). The court continued "we have concluded that the district court did not err in finding that '*Daughenbaugh* was in the scope of his employment when last seen by the ship's officers.' Opinion at 3." *Id.* The *Daughenbaugh* court noted that because plaintiff was required to return to the ship before its appointed sailing time he was acting in the course of his employment when he disappeared

while "en route" to the ship, *id*, along the "route customarily taken" by the crew. *Id.* at 1207. In contrast here, on uncontested facts, the district court found:

> Plaintiff here was pursuing his own private interests when he was injured. He was in the company of his fellow crew members by his own choice in that cocktail lounge. When plaintiff intervened in the dispute between DeJesus and McCarthy, he was not performing a duty that was assigned to him either explicitly or implicitly as an engineer of the S/T CHARLESTON. He had no obligation of any kind to the vessel, its officers or owners to get involved in that altercation. Therefore, on the undisputed facts of the case, plaintiff was not acting "in the course of his employment" as a matter of law at the time of his injury.

Colon v. Apex Marine Corporation, 832 Supp. 508 (D.R.I. 1993), 19a. Here plaintiff was on shore leave and was not returning to the vessel. The district court did not hold that a seaman could never be in the course of his employment while on shore but merely held petitioner was not performing any duty when petitioner intervened while on shore leave. In contrast, *Daughenbaugh* did not hold that a seaman is always in the course of his employment while on shore leave, or that a seaman has a duty to intervene in an altercation between other seamen. The Sixth Circuit in *Daughenbaugh* only held that the district court did not err when it found a seaman returning to a vessel under its particular circumstances to be in the course of employment. There is no embarrassing conflict between the circuits.

Petitioner's cite to *Nowery v. Smith*, 69 F. Supp. 755 (E.D. Pa. 1946), *aff'd*, 161 F.2d 732 (3rd Cir. 1947) (per curiam) similarly does not indicate a conflict in the circuits. There, the district court held, *inter alia* that the term "course of employment", in regard to the seafaring trade, simply defines an individual's status as a seaman and therefore it held the term to be identical to the term "service of the vessel" when

used in the context of maintenance and cure. *Id.* at 757.[3] However, the Third Circuit in *Nowery* did not affirm the above part of the district court's holding. The sole issue on appeal in *Nowery* was whether a seaman injured during a fight in a barroom while on shore leave in a foreign port was entitled to maintenance and cure. *Nowery v. Smith*, 161 F.2d 732 (3rd Cir. 1947). There is no conflict with the Third Circuit.

The First Circuit's affirmance is not in disparity with any decision of the Supreme Court. In *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129 (1959), this Court held that a seaman was "acting in the 'course of employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders." *Id.* at 133. This Court cited with approval *Marceau v. Great Lakes Transit Corporation*, 146 F.2d 416 (2nd Cir. 1945) which held that a ship's cook was allowed to recover under the Jones Act because his injury occurred when *pursuant to duty* he was returning from shore, and also cited *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1942) where the plaintiff was injured when performing a task ashore pursuant to order. *Braen* at 132. When citing to *O'Donnell*, this Court stated in *Braen* "[a] 'seaman' may often be sent off ship to perform duties of his employment." *Braen* at 132. This court did not hold that a seaman is always in the course if his employment while ashore. Nothing in the decision of the district court or in the First Circuit's affirmance suggests that an engineer can never have duties related to safety while on shore or that a seaman performing the work of his employer while ashore cannot recover under the Jones Act. The district court merely held that petitioner was not performing a duty that was assigned either explicitly or implicitly as an engineer aboard

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[3] The district court's holding that the term "course of employment" only defines an individual's status as a seaman is not valid in view of *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 132 (1959) where, starting with the premise an employee was a seaman, this Court then went on to decide whether the seaman was injured in the course of his employment. *Braen* at 131-132.

the S/T CHARLESTON at the time he intervened. *Colon v. Apex Marine Corporation*, 832 F. Supp. 508 (D.R.I. 1993), 19a. The First Circuit merely held that the case involved a unique set of facts and "[a]lthough the legal question presented is open to reasonable debate, we agree with the district court's resolution . . ." (3a) The decision is in conformity with the prior decisions of this Court.

III. THE DISTRICT COURT'S DECISION WHICH WAS AFFIRMED BY THE FIRST CIRCUIT WAS SIMPLY THE APPLICATION OF EXISTING LAW TO A UNIQUE SET OF FACTS

The district court's decision breaks no new ground which is worthy of this Court's review. This Court held in *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129 (1959) that the seaman was in the course of his employment when injured because he was performing a duty required by his employment. The circuit courts that have addressed the issue of "course of employment" make it clear that more is required to be in the "course of employment" while a seaman is ashore than the mere fact he is assigned to the vessel. *See, ie., In re Atlass'*, 350 F.2d 592 (7th Cir. 1965) *cert denied, sub. nom.* 382 U.S. 988 (1966); *McClure v. United States Lines Company*, 368 F.2d 197 (4th Cir. 1966); *Trost v. American Hawaiian S.S. Co.*, 324 F.2d 225, 228 (2nd Cir. 1956), *cert. denied.*, 351 U.S. 937 (1956). In *Kryiakos v. Goulandris*, 151 F.2d 132 (2nd Cir. 1945) cited by petitioner, the seaman's injury arose out of the performance of an explicit job duty. This Court has let stand decisions that have hinged recovery for seamen injured on shore on whether or not the seaman was injured because of a duty required by his job. *See In re Atlass'*, *supra*; *Szopko v. Kinsman Marine Transit Co.*, 397 N.W. 2d 171 (Mich. 1986) *cert. denied.* 483 U.S. 1007 (1987).[4] Even

[4] Plaintiff's attempt to distinguish *In re Atlass'*, 350 F.2d 592 (7th Cir.) *cert. den., sub.nom.* 382 U.S. 988, 86 S. Ct. 551, 15 L.Ed. 2d 476 (1966) and *Szopko v. Kinsman Marine Transit Co.*, 626 Mich 563, 397 N.W. 171, (Mich 1986), *cert. den.*, 486 U.S. 1007 (1987) because in these

Daughenbaugh v. Bethlehem Steel Corp., Great Lakes S.S. Div., 891 F.2d 1199 (6th Cir. 1989), relied upon by petitioner, permitted recovery not merely because the plaintiff seaman was on shore but because the seaman was involved in an activity impliedly required by his employment.

This Court has held that recovery depends on "the nature of the service and its relationship to the operation of the vessel plying in navigable waters." *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1942)

Petitioner testified at deposition that he intervened when requested to do so by the bartender. When asked why he intervened, petitioner did not testify he did so due to an explicit or implicit safety responsibility. Not in response to the motion, or at any time did petitioner submit evidence that he acted because of an alleged safety duty. In its decision, the district court did nothing more than apply the above standard to the undisputed facts before it and held that as a matter of law, at that time of intervention, petitioner was not acting to perform a duty of his employment.

IV. EVEN IF PETITIONER WERE ACTING FOR SAFETY CONCERNS, IT DOES NOT MEAN HE WAS IN THE COURSE OF HIS EMPLOYMENT

Despite the lack of a factual basis, even if this Court were to accept that petitioner was acting for safety concerns, petitioner cites to no decision of this Court nor any circuit court which holds an engineer on shore leave in an American city where police are responsible for law and order, has a duty relating to safety to intervene in an altercation between two seamen in the deck department. To the contrary, circuit court decisions indicate a safety duty is not imposed on a seaman on shore leave merely because the safety of other crew mem-

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cases the plaintiffs were negligent, ignores the premise of the cases that the first step in the analysis is to determine if the seaman was in the course of his employment. In each, course of employment was analyzed first and without relation to negligence.

bers is involved. *See, McClure v. United States Lines Company*, 368 F.2d 197, 199 (4th Cir. 1966); *In re Atlass'*, 350 F.2d 592 (7th Cir. 1965), *Cert. denied., sub nom*, 382 U.S. 988 (1966); *Trost v. American Hawaiian S.S. Co.*, 324 F.2d 679 (2nd Cir. 1956), *cert. denied.*, 351 U.S. 937 (1956). That petitioner was an engineer raises no special duty. *McClure*, at 198.

Also, contrary to petitioner's assertion, the district court did not base its decision of whether petitioner could recover on whether petitioner was injured while on land. That a seaman's duties or lack of duty may vary by his location and activity at the time does not mean that recovery is solely based on the location of an injury. To accept petitioner's argument that location is irrelevant however would extend the alleged safety duty to the point where the employer is the insurer of the safety of a seaman at any shoreside location as long as an "officer" was present. Petitioner cites no authority from this Court, nor any circuit court, to support his argument that a seaman's location and activity is irrelevant to the determination of course of employment.

Petitioner cites to no decision of this Court which extends a master's duty, much less an engineer's duty, to the protection and safety of a seaman at all locations the seaman in the deck department may travel while on shore leave. The cases cited by petitioner are distinguishable. They all involve the duties of the master or involve a situation where an officer is charged with enforcing a shipboard policy. *Montiero v. Paco Tankers, Inc.*, 93 F. Supp. 93 (E.D.Pa. 1950) only held that the *master* of the vessel owed a duty of safe transport to a seaman leaving a vessel until he was away from the *proximity* of the vessel. *The Iroquois*, 194 U.S. 240 (1904) involved the duties of the master of a vessel. In *Jensen v. United States*, 184 F.2d 72 (3rd Cir. 1950), the incident occurred on the vessel when the officers returned to duty. Both *Stankiewicz v. United Fruit S.S. Corp.*, 229 F.2d 580 (2nd Cir. 1956) and *Gerald v. United States Lines Co.*, 368 F.2d 343 (2nd Cir. 1966) involve the duties of the master and officers in enforcing, *on board the*

ship, a company policy and a Coast Guard rule against the use and possession of alcoholic beverages on board a vessel. None involve the unique factual situation in this case where petitioner engineer is fortuitously present when a fight breaks out between two members of the deck department in a bar ashore after spending hours in other bars. None of the above cases hold that an engineer has an unremitting responsibility for the safety of every crew member at any time while on shore leave and none of the cases require much less suggest the rule petitioner now seeks.

CONCLUSION

The First Circuit's decision creates no disparity between the First Circuit and the Sixth Circuit or any other circuit, and raises no public policy issue requiring this Court's attention, but applies existing law to a unique factual situation. The writ should be denied.

Dated: New York, New York
February 23, 1995

Respectfully submitted,

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